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# Written statement* submitted by the Asian Legal Resource Centre, a non-governmental organization in general consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[16 February 2015]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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# PAKISTAN: An attack on independence of judiciary and right to fair trial

The Asian Legal Resource Centre (ALRC) wishes to bring to the attention of the UN Human Rights Council the supra-constitutional arrangement that has established military courts and is depriving the people of Pakistan their right to fair trial.

Following the gruesome massacre of children at the Army Public School in Peshawar on 16th December 2014, under military pressure, the government lifted the moratorium on death sentences and rapidly pushed through the 21st Constitution Amendment, establishing military courts with summary trials.

From 22nd December 2014 to date, 24 persons believed to be terrorists have been executed by hanging. According to the Minister of Interior Affairs, a list of over 500 more persons has been prepared and they too will be hanged this year. Today, there are more than 8,000 persons on death row in Pakistan.

The supra-constitutional move is being touted by the State as a "necessary evil" to counter terrorism and militancy. Pakistani civil society and its jurists have condemned the move, arguing that it will only add fuel to the fire. This is not the first time such a regressive measure has been taken: in 1977 and in 1998 military courts were established in Pakistan; they were subsequently termed unconstitutional and struck down by the Supreme Court. The government decided to play its cards well this time around and established the military courts by amending the Constitution, thus removing the matter from the jurisdiction of the Supreme Court.

The Constitutional (twenty-first) Amendment Bill, 2015, establishing the military courts was passed in the National Assembly on 6th January 2015. The military courts so established are against the basic foundation / structures of the Constitution; the Constitution envisages a separation of power amongst the pillar of the state—the judiciary, the executive, and the legislature. Giving any single pillar all-encompassing powers runs is against the basic structure of the Constitution of Pakistan.

The government has created parallel systems within the justice system. Not only is it against the right of fair trial, as provided in ICCPR Articles 14 and 16, it is against the fundamental right of fair trial and due process as enshrined in Article 10A of the Constitution of Pakistan.

The established constitutional principal dictates that military tribunals remain subordinate to the civilian appellate courts and not vice versa; the right to appeal should vest with the civilian judges. The establishment of military courts has taken away the fundamental rights guaranteed in the Constitution, which are non-derogable under any circumstances.

The procedure followed by the military courts does not strictly adhere to the dictates of equality before law and places the burden of proof on the accused to prove himself or herself innocent, something that runs counter to a fundamental principal of criminal justice, "innocent until proven guilty".

The trials conducted by the Pakistani military are often rushed. The circumvention of due process often results in miscarriage of justice. As these courts do not follow precedence, their proceedings are often kept secret; it is but natural that their transparency and conviction will always remain in question.

The procedure followed by these military courts is such that the complainants, prosecutors, and judges are all military personnel with little or no legal background. The summary court procedures allow little room for the accused to defend themselves; the accused are not allowed legal counsel. The accused are deemed convicts *ab initio*. Thus there is a slim chance of them being acquitted. The military court summary proceedings can order execution on the slimmest evidence. The accused will thus be denied due process and fair trial, a fundamental right under Article 5 of the Constitution of Pakistan.

This is but another manifestation of the constant effort of the government to undermine the independence of the judiciary and deprive the people fair trial. There already exist Anti Terrorist Courts (ATC) for the trial of terrorists. In 2014, the government passed law called the Pakistan Protection Act (PPA) to combat terrorism, authorizing law enforcement agencies to shoot suspects on sight and detain suspects for ninety days for 90 days without trial. Military courts to combat the terrorism are but one step further. The government, under pressure from the powerful military establishment, is strangulating the working of the judiciary and allowing supra-constitutional forces to eat up the little space for fair trials in Pakistan.

However, the government's act of enabling the military to try terror suspects in military courts is not a response to the urgent call by the people to bring terrorism to an end and to restore the rule of law in the country. Nowhere in the world have military courts resolved the problem of terrorism, or any other problems. What military courts will do is only add to the chaos in Pakistan, a country already besieged with virtually every form of chaos imaginable. For the government to even proclaim the idea that military courts will bring about law and order demonstrates how off-kilter the country has become and how incapable the politicians are.

Extrajudicial punishment through military courts will only heighten the feeling among the people that the State is unable to act within the legitimate and legal framework to deal with the terrorist threat. The perception of the government acting outside the framework of the law will further undermine the government, something that will be exploited by terrorists. Military courts performing civilian court functions will increase the high levels of instability that permeates life in Pakistan.

The legal community, particularly the Bar Associations from the district level to the Supreme Court, has rejected the establishment of military courts and is observing a day of protest once every week. The Bar Associations have also challenged the supra-constitutional act of the government.

Anarchy in Pakistan will likely develop and the judiciary and political parties will then, once again, be threatened into silent compliance by the powerful military establishment. The pillars of the state are once again at loggerheads, as was the case during General Musharraf's era. The general opinion amongst the masses is that parliamentarians have time and again betrayed the people, and that this time they have betrayed the Constitution.

The question on every Pakistani's mind is: who will guarantee the fundamental rights to the people? Establishing military courts, citing low conviction rates, is not appropriate approach to tackle the menace. Basic rights of the common man have been traded with the promulgation of draconian laws like Protection of Pakistan Ordinance (PPO) and the establishment of military courts, which will only temporarily serve the security and safety of the political elite. The political and military elite, in connivance, will continue to evade accountability, framing fractured internal policy, while hoodwinking the masses into believing that it is for their own good.

The argument in favour of letting military courts deal with terrorists is an acknowledgement of the failure of the police and the judicial system in dealing with crime. It is quite normal for people who have witnessed the massacre of their own children to be enraged. It should be within the capacities of Pakistan's politicians to utilise this moment of rage among the people in order to bring about radical measures to address the country's failed criminal justice system, rather than to allow such rage to burn down the entire political system and whatever is left of the civilised way of life of the people of Pakistan.

RECOMMENDATIONS:

The ALRC requests the intervention of the UN HRC in order to urge the government of Pakistan to:

A. Invest in the Judiciary and promulgate witness and complainant protection laws to allow the judicial system to function. Setting up of parallel legal systems like military courts cannot and will not address the problem of terrorism. The criminal justice system of Pakistan needs major overhauling and immediate attention of the state's policy makers. Any judicial system that is applied selectively to punish the poor man for petty crime, while allowing the elite to get away with murder, will be unsustainable.

B. Streamline and strengthen the present judicial administration system as a whole, including, specifically, the police (investigation), the prosecution, and the Judiciary. There are various Law Commission Reports on the subject, where remedies have been pinpointed. These recommendations must be implemented by the State.

C. Free the judicial system free from nepotism and ensure transparency in the prosecution of the accused. The conviction rate is dismal: a mere 4%. The prosecution most often fails to prove guilt. The government often neglects the very important institution of prosecution, resulting in the guilty going scot-free, and the Judiciary bears the brunt of the blame. The government needs to invest in the prosecution to purge it of nepotism and corruption and ensure that there is no political intervention in the judicial process.

It is high time for the Pakistan government to reform the criminal justice system, as it is faulty investigation and weak prosecution that lets criminals get away and traps the defenceless poor for crimes they may never have committed. However prudent it may seem now to have military courts for executing "terrorists", it is simply another smokescreen, which creates the impression of action when it is in reality a regression away from democracy and the rule of law. All of this is besides the point that capital punishment is unacceptable in any society that believes in law, however grave the crime may be.